IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 61377-4-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	UNPUBLISHED OPINION
	)	
DAVID LAVON MELTON,	)	
	)	
Appellant.	)	FILED: June 21, 2010

Grosse, J. — In response to a jury query requesting the opportunity to rehear a victim's testimony, the judge mistakenly referred the jury to the accomplice liability instruction rather than the general instruction prohibiting the rehearing of testimony. This mistake was not a judicial comment on the evidence. Even if this court were to construe this allegation to have some merit, there is no resulting prejudice given the salient fact that here, the defendant admitted firing a gun out the window of the car.

Melton raises a myriad of other issues, none of which have any merit. We affirm the judgment and sentence.

FACTS

On April 1, 2006, David Melton was riding in a Ford Expedition with six other teenagers: Dimitris Tinsley, Marcus Holmes, Daniel Degtjar, Jaron Cox, Jeffrey Harris and Michael Jeffries. The car belonged to Dimitris Tinsley, but his cousin, Marcus Holmes, was driving. Earlier that evening, the boys were at Franklin High School when a dance ended. Melton was talking to his girlfriend

next to her car when he heard gunshots and thought someone was shooting at the Expedition. Holmes also heard shots and believed that some of them hit the Expedition. Holmes believed that the shooters were from the south end of Seattle because of a long-standing rivalry between the south end and the central district.

The young men returned to the car. Holmes drove, Tinsley sat in the front passenger seat, Melton sat directly behind him in the right rear passenger seat, Harris sat in the left rear passenger seat and Degtjar sat between them. Cox and Jeffries sat in the back cargo area. Holmes described everyone as being angry. Holmes testified that Melton and Tinsley both yelled at him to go to the south end to find the people who shot at them. Melton remarked that he was not going to let people shoot at him and get away with it. The young men drove to the intersection of South Henderson Street and Rainier Avenue South, a known hangout for south Seattle gang members.

At the same time the Expedition was approaching the intersection, another group of young men, Jeremiah Butler, Joseph Williams, Shawn Webster, Jesse Baker and Carlos Pace, were disembarking from a bus. Melton rolled down his window telling Holmes to slow down. In response to Melton's expressed desire to see who the people were, Holmes drove slowly. Holmes testified that he then heard something from the back that sounded like a gun being loaded, followed by the sounds of shots from inside the car. Shawn Webster was shot in the head, but survived; Jeremiah Butler had a bullet hole in

his sweat shirt and the other two were frightened, but unscathed. Neither Jesse Baker nor Carlos Pace testified.

Melton testified that he grabbed a gun that belonged to someone else and fired it out the window as the Expedition drove past the bus stop. Melton also testified that he fired the gun into the air and did not point it at anyone or intend to hit anyone. He further testified that he had heard gunshots from outside the car and thought he and his companions were being shot at.

Melton was charged with one count of first degree assault and three counts of second degree assault. Each count carried a deadly weapon enhancement. A jury convicted Melton of four counts of second degree assault, with a firearm enhancement for each, and one count of unlawful possession of a firearm in the second degree. Melton appeals.

ANALYSIS

Comment on the Evidence

While deliberating, the jury sent the judge a written request asking to see the testimony of the shooting victim, Shawn Webster. After consultation with counsel via telephone, it was agreed that the court would instruct the jury to re-read Instruction 30. The next day the court verified with counsel that it had instructed the jury to read Instruction 30 and neither counsel objected.[1]

[1] "My Bailiff got in touch with both of you and indicated to you that the Court was going to respond with the following:"

> Please reread jury Instruction Number 30 and continue with your deliberations.
>
> Specifically, jury Instruction Number 30 simply is, I think it is the third paragraph in the instruction that makes it very clear to jurors that you will not rehear or hear testimony twice, in essence, to make a long story short. Both

Instruction 30, however, was the accomplice liability instruction and provided:

> A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.
>
> A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:
>
> (1) solicits, commands, encourages, or requests another person to commit the crime; or
>
> (2) aids or agrees to aid another person in planning or committing the crime.
>
> The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

The court had intended to ask the jury to reread Instruction 31, which provided in pertinent part:

> You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during deliberations.

Melton contends that the court's asking the jury to reread Instruction 30 amounted to an improper comment on the evidence, essentially directing the jury to find guilt via accomplice liability.[2] We disagree.

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attorneys said that . . . was fine. The Court then did respond and sent that back to the jury room at 4:00 o'clock.

Both of you are here now. I'll go ahead and hand this down to you so you can see exactly what I asked the jurors to do. And if there's any disagreement that that's what took place, please let me know.

[2] The State argues that Melton failed to raise the issue below and is thus precluded from raising it on appeal. But failure to raise this issue below does not preclude our review because a judicial comment on the evidence is an error of constitutional magnitude, and as such may be raised for the first time on appeal. State v. Levy, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006); RAP 2.5.

"In determining whether a trial judge's conduct or remarks amount to a comment on the evidence, reviewing courts evaluate the facts and circumstances of the case."[3] One circumstance considered is whether the trial court's remarks were isolated or cumulative.[4] Here, the direction to the jury to read Instruction 30 was in response to their query regarding a victim's testimony, not that of any possible perpetrator. Instruction 30 neither conveyed the trial court's view of the evidence nor misstated the law. It was not a comment on the evidence and the judge did not express his opinion of the evidence. Further, the jury was properly instructed on the elements of the crime and properly instructed to disregard any argument or comment that was not supported by the law as given to the jury by the court.[5]

Even if we were to view the judge's directing the jury to the incorrect instruction on accomplice liability as a comment on the evidence, Melton could not have been prejudiced thereby because Melton himself testified and admitted that he fired the gun out the window.[6]

Admission of Testimony

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[3] State v. Sivins, 138 Wn. App. 52, 58, 155 P.3d 982 (2007).
[4] State v. Eisner, 95 Wn.2d 458, 462-63, 626 P.2d 10 (1981).
[5] Instruction 20 contains the elements of the crime and Instruction 1 includes the caution:

> Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during the trial or in giving these instructions, you must disregard the apparent comment entirely.

[6] In his statement to police which was admitted at trial, Melton stated:

> When the group at Henderson saw us, they shot at us. I was scared so I shot back at them. I was trying to protect myself and the others that were with me. They were my family and friends.

Melton argues that the trial court abused its discretion by admitting testimony that witnesses were reluctant to testify because of fear of retaliation. Detective Thomas Mooney's testimony, to which Melton objects, revolved around the reluctance of many witnesses in gang-related cases to testify because they feared retaliation. Detective Mooney testified regarding the difficulty he had in finding the Expedition's occupants and in persuading them to testify. No objections were made to this portion of the testimony. The prosecutor then asked whether the lack of cooperation encountered by the detective was unusual and why. Defense counsel objected on the basis of speculation and the court asked the prosecution to provide foundation:

> Q. Have you spoken with witnesses who have been uncooperative about the reasons for their lack of cooperation?
> A. Yes.
> Q. And as you have continued to investigate these other cases and this case, have individuals told you why they don't want to cooperate?
> A. Yes.
>
> Defense counsel objected and was overruled.
>
> Q. (By [Prosecutor]) What are some of the reasons that witnesses, in your training and experience, give to not testify in cases like this?
> A. Retaliation.
>
> The court granted defense counsel a continuing objection.
>
> Q. (By [Prosecutor]) Go Ahead.
> A. The primary reason that I've found witnesses to be uncooperative in such cases is for a fear of retaliation and being labeled a snitch.
> Q. Labeled as a snitch, I assume that's a bad thing?
> A. Yes absolutely.
> Q. In the gang world, is that an especially bad thing?
> A. Yes.
> Q. What about parents?
> A. I frequently run into parents that are uncooperative. I believe it's for

> the same reasons. Oftentimes they're in denial regarding gang activity and they're also in fear of retaliation.

Melton contends that State v. Bourgeois[7] prohibits this testimony. He argues that since there was no proof that he was connected to the reluctance of any particular witness to testify, the detective's comment was improper. But this argument mischaracterizes both the holding in Bourgeois and the detective's testimony.

In Bourgeois, it was the witnesses themselves who were queried about their reluctance to appear.[8] There, the court held that the admission of the testimony of three witnesses about their reluctance to testify was error because there was no evidence of their credibility being at issue. But, the Bourgeois court also found that the testimony of a fourth witness regarding his reluctance to testify was properly elicited during direct examination because "it was reasonable for the State to anticipate the attack and 'pull the sting' [out] of the defense's cross-examination."[9] There, the witness had initially given the police a false name and identified someone other than Bourgeois from a photo montage as the person whom he saw running from the scene. When approached again later, the witness gave his correct name and identified Bourgeois. Thus, the Bourgeois court found no error because the testimony was relevant to an anticipated line of cross-examination, even though the attack came after the State's direct examination.[10]

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[7] 133 Wn.2d 389, 945 P.2d 1120 (1997)
[8] 133 Wn.2d at 401.
[9] Bourgeois, 133 Wn.2d at 402.
[10] 133 Wn.2d at 402-403.

Here, the State's witnesses who had already testified were impeached by their prior statements to the police. For example, at trial Cox maintained he was asleep until he heard the gunshots and denied previous conversations and actions that he had described in his signed statement. Tinsley likewise denied making certain statements to the police. Their credibility, like the fourth witness in Bourgeois, was at issue.

Further, Detective Mooney's testimony was not directed at a particular witness, but rather was a general discussion of his experience and its applicability to gang cases that he had worked on. The trial court did not abuse its discretion in admitting this evidence.

Detective Michael Sloan's testimony

Melton argues that permitting the detective's rebuttal testimony denied him his Sixth Amendment right to confrontation under Crawford v. Washington.[11] Defense counsel's cross-examination of Detective Sloan was designed to challenge the detective's conclusion that Melton was the shooter. On cross-examination, Detective Sloan testified that the witnesses from the scene were able to identify only the car and not any of its occupants. Defense counsel's continued questioning about the possible identification of one of the vehicle's occupants, opened the door to the detective's response that Melton had been identified by the six car occupants.

[11] "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI; Crawford, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (declarant's testimonial hearsay statements inadmissible unless declarant unavailable and defendant had a prior opportunity for cross-examination).

The decision to admit or exclude evidence or limit the scope of redirect examination is within the trial court's discretion.[12] Here, Melton opened the door because his cross-examination was designed to show that the evidence indicated the shooting suspect was someone other than Melton. Under these circumstances, the trial court did not abuse its discretion by admitting it.

Firearm Enhancements

Melton argues that the sentencing court erred in imposing multiple enhancements for the same criminal conduct. This same issue was squarely addressed and rejected by the Washington Supreme Court in State v. Mandanas[13] when it held that courts are statutorily required to impose multiple enhancements when a defendant is convicted of multiple enhancement-eligible offenses that constitute the same criminal conduct.[14]

Double Jeopardy

Melton argues that the imposition of a firearm enhancement violates double jeopardy when use of a firearm is an element of the underlying crime. The Washington Supreme Court rejected identical arguments in State v. Kelley[15] when it held that the imposition of a firearm enhancement where the use of a firearm is an element of the underlying offense is not a violation of double

[12] State v. Gallagher, 112 Wn. App. 601, 611, 1 P.3d 100 (2002).
[13] 168 Wn.2d 84, 228 P.3d 13 (2010).
[14] See RCW 9.94A.533(3)(e), which provides in pertinent part: "Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter."
[15] 168 Wn.2d 72, 226 P.3d 773 (2010).

jeopardy.

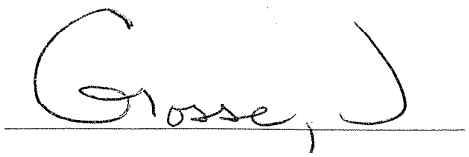
Cumulative Error

Melton contends that cumulative error denied him a fair trial. The cumulative error doctrine applies to instances where there have been several trial errors that, standing alone, might not be sufficient to justify reversal but, when combined, may deny a defendant a fundamentally fair trial.[16] Here, the only mistake was giving the wrong instruction to the jury in response to their query. There was no cumulative error.

Statement of Additional Grounds

Melton contends the trial court abused its discretion because it failed to consider his constitutional right to a particular tribunal when it declared a mistrial because of the prosecutor's illness. In the middle of the State's case, the prosecutor became ill and was unable to continue. Here, the trial court waited two days for the prosecutor to recover. The trial court made an express finding of manifest necessity for the mistrial. A court's decision to grant a mistrial after jeopardy has attached is afforded great deference.[17] The trial court acted in a reasonable fashion.

The judgment and sentence is affirmed.



WE CONCUR:

[16] State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).
[17] State v. Melton, 97 Wn. App. 327, 332, 983 P.2d 699 (1999).